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KARL MORELL

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February 16, 2010

226430

BY HAND DELIVERY

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-001

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FEB 16 2010

Part of  
Public Record

Re: STB Docket No. AB-6 (Sub-No. 470X), BNSF Railway Company –  
Discontinuance Of Trackage Rights Exemption – In Peoria and  
Tazewell Counties, Illinois

Dear Ms. Brown:

Attached for filing are the original and ten copies of a Petition for Exemption under 49 U.S.C. § 10502. Also attached is a check covering the \$6,400 filing fee.

Please time and date stamp the extra copy of the Petition and return it with our messenger.

If you have any questions, please call me.

Sincerely,



Karl Morell

**FILED**

FEB 16 2010

**SURFACE  
TRANSPORTATION BOARD**  
Enclosures

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**SURFACE  
TRANSPORTATION BOARD**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-6 (SUB-NO. 470X)

BNSF RAILWAY COMPANY  
-- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --  
IN PEORIA AND TAZEWELL COUNTIES, ILLINOIS

PETITION FOR EXEMPTION

**FILED**

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SURFACE  
TRANSPORTATION BOARD

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FEB 16 2010

SURFACE  
TRANSPORTATION BOARD

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(202) 638-3307

Attorneys for:  
BNSF Railway Company

Dated: February 16, 2010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. AB-6 (SUB-NO. 470X)

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BNSF RAILWAY COMPANY  
-- DISCONTINUANCE OF TRackage RIGHTS EXEMPTION --  
IN PEORIA AND TAZEWell COUNTIES, ILLINOIS

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PETITION FOR EXEMPTION

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BNSF Railway Company ("BNSF") petitions the Surface Transportation Board ("STB" or "Board") to exempt, under 49 U.S.C. § 10502, from the prior approval requirements of 49 U.S.C. § 10903, BNSF's discontinuance of trackage rights over a 3-mile rail line owned by Peoria and Pekin Union Railway Company ("P&PU")<sup>1</sup> and located in Peoria and Tazewell Counties, Illinois.

**PROPOSED TRANSACTION**

BNSF proposes to discontinue its trackage rights over the P&PU rail line located between Bridge Junction in Peoria, IL, and P&PU Junction in East Peoria, in Peoria and Tazewell Counties, Illinois (the "Line").<sup>2</sup> The Line traverses U.S. Postal Service Zip Codes 61602 and 61611. A map of the Line is attached as Exhibit A.

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<sup>1</sup> P&PU leased its rail lines to the Tazewell & Peoria Railroad ("TPR"). See STB Finance Docket No. 34544, *Tazewell & Peoria Railroad, Inc. – Lease and Operation Exemption – Peoria and Pekin Union Railway Company* (not printed), served September 28, 2004.

<sup>2</sup> There are no known mileposts associated with the Line.

Based on information in BNSF's possession, the Line does not contain any federally granted right-of-way. Any documentation in BNSF's possession will be made available to those requesting it.

### **STATEMENT OF FACTS**

One of BNSF's predecessors acquired the overhead trackage rights in 1973. *See Finance Docket No. 27317, Burlington Northern, Inc. – Trackage Rights – Peoria & Pekin Union Railway Company Between Peoria and East Peoria, Illinois* (not printed), served June 4, 1973. The purpose of the trackage rights was to enable BNSF to interchange traffic with the Toledo, Peoria & Western Railroad Company ("TPW") in East Peoria via the P&PU bridge over the Illinois River after the parallel TPW bridge was damaged. BNSF's predecessor discontinued the direct interchange with TPW in 1982 and thereafter the interchange was made via P&PU. The interchange currently takes place via the TPR.

### **EXEMPTION REQUESTED**

A rail carrier may not discontinue trackage rights operations without the prior approval of the Board. 49 U.S.C. § 10903(d); *see also Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1946).

Under 49 U.S.C. § 10502, however, the Board must exempt a transaction from regulation when it finds that:

- (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and
- (2) either:
  - (a) the transaction is of limited scope; or

(b) regulation is not necessary to protect shippers from the abuse of market power.

The legislative history of Section 10502 reveals a clear Congressional intent that the STB should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. In enacting the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress encouraged the STB's predecessor to liberally use the expanded exemption authority under former Section 10505:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.

H.R. Rep. No. 1430, 96<sup>th</sup> Cong. 2d Sess. 105 (1980). *See also Exemption From Regulation – Boxcar Traffic*, 367 I.C.C. 424, 428 (1983). *vacated and remanded on other grounds, Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which re-enacted the rail exemption provisions as Section 10502. H.R. Rep. 422, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 168-69 (1995).

**A. The Application Of 49 U.S.C. § 10903 Is Not Necessary to Carry Out The Rail Transportation Policy**

Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption would minimize the unnecessary expenses associated with the filing of a formal discontinuance application and expedite regulatory decisions [49 U.S.C. § 10101(2)].

*See, e.g., Norfolk & W. Ry. Co. – Abandonment Exem. – Cinn., Hamilton County, OH*, 3 S.T.B. 110 (1998); STB Docket No. AB-367 (Sub-No. 2X), *Georgia Central Railroad, L.P. – Abandonment Exemption – In Chatham County, GA* (not printed), served September 17, 1997 (“*Georgia Central*”). In discontinuing its trackage rights operations over the Line, BNSF will be able to continue interchanging the same traffic with TPW via TPR. Granting the exemption will thus foster sound economic conditions and encourage efficient management. 49 U.S.C. § 10101(5) and (9). *See, e.g.,* STB Docket No. AB-318 (Sub-No. 4X), *Louisiana & Delta Railroad, Inc. – Abandonment Exemption – In Lafourche and Assumption Parishes, LA* (not printed), served August 26, 1997; STB Docket No. AB-497 (Sub-No. 1X), *Minnesota Northern Railroad, Inc. – Abandonment Exemption – In Red Lake and Polk Counties, MN* (not printed), served November 14, 1997. Other aspects of the rail transportation policy are not affected adversely. For example, competition and the continuation of a sound rail transportation system are not affected since BNSF does not serve any shippers on the Line and the overhead traffic will continue to be interchanged by BNSF to TPW via TPR.

Where, as here, the trackage rights are simply overhead and no local service is affected, the Board and its predecessor, the Interstate Commerce Commission (“ICC”), have consistently held that formal regulation of the discontinuance is not necessary to carry out the rail transportation policy. *See, e.g.,* Docket No. AB-102 (Sub-No. 25X), *Missouri-Kansas-Texas R. Co. – Exemption – Discontinuance of Trackage Rights in Labette and Cherokee Counties, KS* (not printed), served February 9, 1990. This is particularly true where, as here, the carrier discontinuing the overhead trackage rights is able to continue providing the same service only under another arrangement. *See* Docket No. AB-6 (Sub-No. 347X), *Burlington Northern R. Co. – Abandonment and Discontinuance of Trackage Rights Exemption – In Greene, Sumter.*

*Choctow, Washington and Mobile, AL* (not printed), served July 6, 1993; Docket No. AB-6 (Sub-No. 340X). *Burlington Northern R. Co. – Discontinuance of Trackage Rights Exemption – Between East Dubuque, IL and Dubuque, IA* (not printed), served September 1, 1992 (“*Dubuque Discontinuance*”).

**B. This Transaction Is Of Limited Scope**

In determining whether a proposed transaction is of limited scope, the Board considers a variety of factors, such as the length of the rail line, the number of shippers on the line and the traffic volume. *See, e.g.*, Docket No. AB-347 (Sub-No. 1X), *Florida West Coast Railroad Company – Abandonment Exemption – Gilchrist and Levy Counties, FL* (not printed), served January 16, 1992; Docket No. AB-6 (Sub-No. 349X), *Burlington Northern Railroad Company – Abandonment Exemption – In Greene and Polk Counties, MO* (not printed), served August 27, 1993.

The proposed transaction is clearly of limited scope. BNSF is seeking to discontinue overhead trackage rights over a 3-mile rail line that BNSF has not used in nearly 30 years. Moreover, BNSF is unable to serve any shippers located on the Line. The shortness of the Line, the limited geographic area involved, and the lack of ability to provide local service demonstrate the limited scope of the proposed discontinuance. *See, e.g.*, Docket No. AB-397 (Sub-No. 3X), *Tulare Valley Railroad Company – Abandonment Exemption – In Tulare And Fresno Counties, CA* (not printed), served February 9, 1995; Finance Docket No. 31088 and Docket No. AB-43 (Sub-No. 148X), *Southern Ry. Co. and Norfolk Southern Corp. – Purchase – Illinois Central R. Co. Line between Fulton, KY and Haleyville, AL – And Trackage Rights – Illinois Central R. Co. Line between Fulton, KY and Centralia, IL* (not printed), served May 9, 1988 (discontinuance of overhead trackage rights limited in scope).

**C. This Transaction Will Not Result In An Abuse of Market Power**

The proposed discontinuance will not reduce the number of competitive rail options available to any shipper. Because the trackage rights were overhead in nature, BNSF was not able to serve any local shippers on the Line. The overhead traffic interchanged between BNSF and TPW will continue to move as it has for nearly 30 years via the TPR. Therefore, regulation is not necessary to protect shippers from an abuse of market power. *See, e.g.*, STB Docket No. AB-55 (Sub-No. 576) *CSX Transportation, Inc. – Abandonment Exemption – In Guernsey County, OH* (not printed), served November 22, 1999; STB Docket No. AB-55 (Sub-No. 563X), *CSX Transportation, Inc. – Abandonment Exemption – In Harrison County, WV* (not printed), served September 25, 1998; *Georgia Central*.

The proposed discontinuance poses no threat of market power abuse by BNSF or any other carrier. *See, e.g.*, Docket No. AB-6 (Sub-No. 302X), *Burlington Northern R. – Trackage Rights Termination and Discontinuance of Operations Exemption – In Tulsa, Wagoner, and Muskogee Counties, OK* (not printed), served December 21, 1988 (regulation not necessary to protect shippers from the abuse of market power where carrier provided overhead service only and all shippers would continue to receive service); *Dubuque Discontinuance* (regulation not necessary to protect shippers from abuse of market power where service would continue under car haulage agreement).

**ENVIRONMENTAL AND HISTORIC REPORTING REQUIREMENTS**

This proceeding is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(6) (discontinuance of trackage rights where the line will continue to be operated) and from historic reporting requirements under 49 C.F.R. § 1105.8(a) (because excepted by 49 C.F.R. § 1105.8(b)(3)). *See* STB Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson*

*Railway Company, Inc. – Discontinuance of Trackage Rights – In Susquehanna County, Pa and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY (not printed), served January 19, 2005.*

### **FEDERAL REGISTER NOTICE**

A draft Federal Register notice is attached to this Petition as Exhibit B.

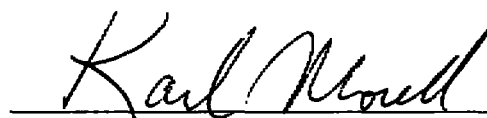
### **LABOR PROTECTION**

The interests of railroad employees who may be adversely affected by the proposed discontinuance will be adequately protected by the labor protection conditions in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979).

## CONCLUSION

Application of the regulatory requirements and procedures of 49 U.S.C. § 10903 is not required to carry out the rail transportation policy set forth in 49 U.S.C. § 10101, as previously described in this Petition. Nor is STB regulation required to protect shippers from the abuse of market power. Moreover, the proposed discontinuance is of limited scope. Accordingly, BNSF respectfully urges the Board to grant the discontinuance.

Respectfully submitted,

A handwritten signature in black ink, reading "Karl Morell", is written over a horizontal line.

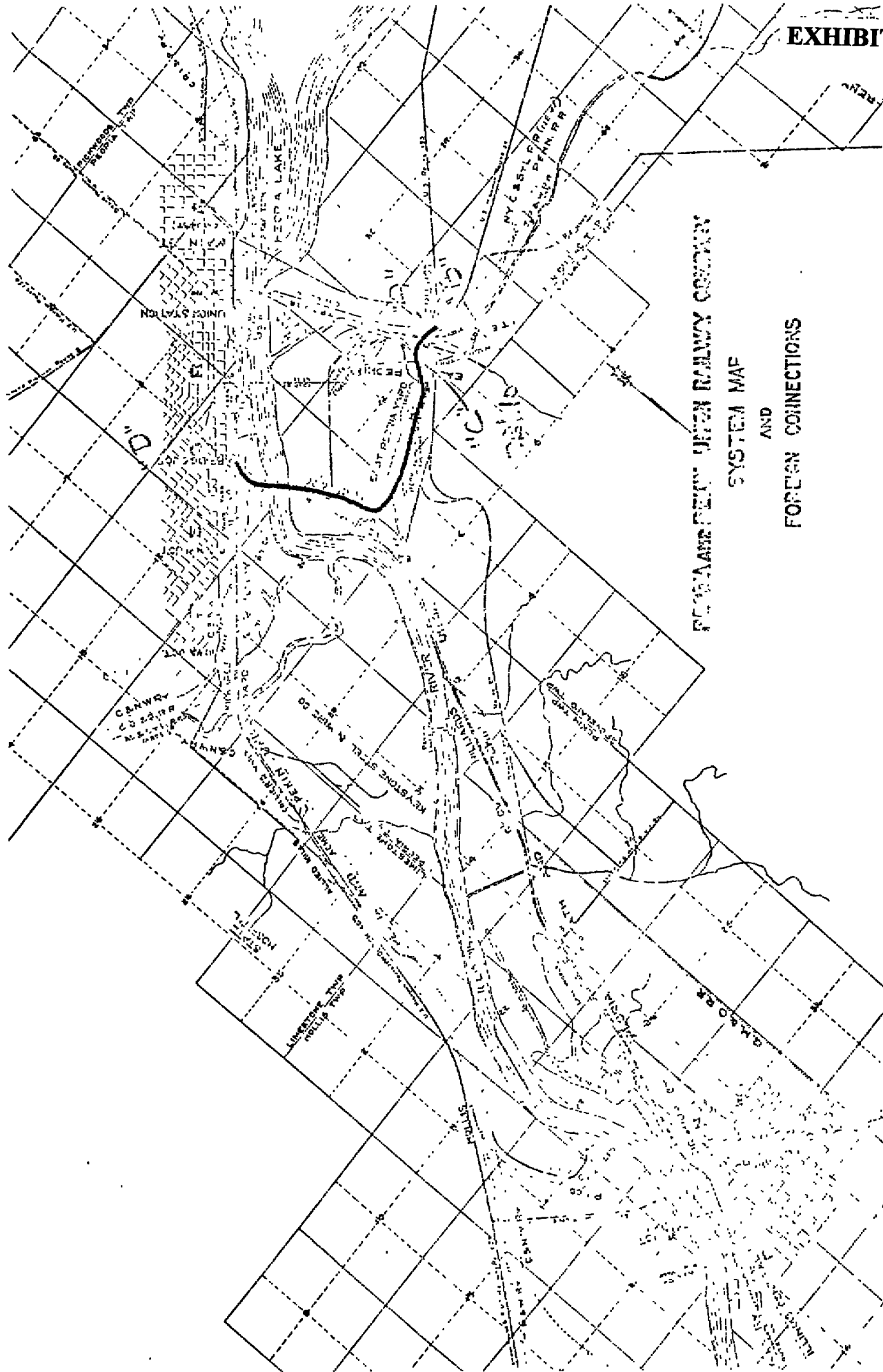
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Attorneys for:  
BNSF Railway Company

Dated: February 16, 2010

PORTLAND AND PORTLAND RAILWAY COMPANY  
SYSTEM MAP  
AND  
FOREIGN CONNECTIONS



## **EXHIBIT B**

### **SURFACE TRANSPORTATION BOARD**

**STB DOCKET NO. AB-6 (Sub-No. 470X)**

#### **BNSF RAILWAY COMPANY --DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION-- IN PEORIA AND TAZEWEILL COUNTIES, ILLINOIS**

On February 16, 2010, BNSF Railway Company (BNSF) filed with the Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to discontinue overhead trackage rights over approximately 3 miles of railroad line owned by Peoria and Pekin Union Railway Company and operated by Tazewell & Peoria Railroad located between Bridge Junction in Peoria, IL, and P&PU Junction in East Peoria, IL. The line traverses United States Postal Service Zip Codes 61602 and 61611 in Peoria and Tazewell Counties, Illinois.

The line does not contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

The interests of railroad employees will be protected by the conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by June \_\_, 2010.

This proceeding is exempt from environmental reporting requirements under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

Any offer of financial assistance for subsidy under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each offer of financial assistance must be accompanied by the filing fee, which currently is set at \$1,500. See 49 C.F.R. 1002.2(f)(25).

All filings in response to this notice must refer to STB Docket No. AB-6 (Sub-No. 470X) and must be sent to: (1) Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001; and (2) Karl Morell, Of Counsel, Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005. Replies to the petition are due on or before \_\_\_\_\_, 2010.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238 or refer to the full discontinuance regulations at 49 C.F.R. part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis at (202) 245-0305 [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV."


Decided: \_\_\_\_\_ 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings,

## CERTIFICATE OF SERVICE

I hereby certify that, on this 16<sup>th</sup> day of February, 2010, I have caused the foregoing Petition for Exemption to be served by first class mail, postage pre-paid on the following parties:

<b>State Public Service Commission</b>  Illinois State Clearinghouse Office of the Governor 207 Statehouse Springfield, IL 62706  Illinois Commerce Commission 527 East Capitol Avenue Springfield IL 62701	<b>National Park Service</b>  Chief of National Recreation and Trails U.S. Dept. of Interior - Nat'l. Park Service Recreation Resources Assistance Division 1849 C Street, NW Washington, DC 20240-0001  <b>National Park Service</b>  National Park Service 1709 Jackson Street Omaha, NE 68102
<b>Military Traffic Management Command</b>  MTMCTEA ATTN: SDTE-SE Railroads for National Defense 709 Ward Drive, Building 1990 Scott AFB, IL 62225-5357	<b>U.S. Department of Agriculture</b>  U.S. Department of Agriculture Chief of the Forest Service 4th Floor N.W., Yates Building 201 14 <sup>th</sup> Street, S.W. Washington, DC 20250




Karl Morell

## **CERTIFICATE OF PUBLICATION**

The undersigned hereby certifies that notice of the proposed discontinuance in STB Docket No. AB-6 (Sub-No. 470X) was published on February 3, 2010, in the Journal Star, Peoria, IL, a newspaper of general circulation in Peoria and Tazewell Counties, Illinois as required by 49 C.F.R. § 1105.12.

Dated: February 16, 2010

  
Karl Morell